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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 584

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioner,

—against—

NATIONAL SCREEN SERVICE CORPORATION,
Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, which judgment affirmed (one judge dissenting) the judgment of the United States District Court for the Southern District of New York.

The action is one for alleged breach of contract of a policy of liability insurance by petitioner, a casualty insurance company.

The Opinion Below

The opinion of the majority of the Court of Appeals for the Second Circuit and the dissenting opinion have not yet been officially reported. Both are printed in the Appendix to this petition.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Question of Law

In the standard national general liability policy purchased by manufacturers, sellers and suppliers of products, where the insured has *not* purchased the available so-called "products hazard coverage" (which coverage affords insurance to the insured, after he has relinquished *possession* to others, for harm to third parties caused by the existence of any condition in the product), does the phrase "after the Insured has relinquished *possession* (of its product) to others" mean (a) *actual* possession only (so that there is no coverage when physical possession is surrendered to others) or (b) *also constructive* possession (so that there is coverage when physical possession is surrendered to others)?

The Procedural Question

Assuming that the Court of Appeals was in error in this private litigation between two parties, should this Court take time to consider this case in view of the fact:

(1) that it is petitioner's claim that the Court below is in absolute conflict with the Court of Appeals for the Ninth Circuit in its decision in *General Casualty Company of America* v. *Azteca Films, Inc.*, 278 F(2d) 161 (C.A., 9th, 1960);

(2) that it is petitioner's claim that the decision below is in conflict with the controlling rule of the New York Court of Appeals for construing insurance contracts; and

(3) that decisions concerning insurance coverage have national scope because of the standard policies issued?

Statement

Plaintiff purchased a comprehensive general liability policy from defendants in New York wherein, under Coverage B of the Insuring Agreements, defendant agreed:

> "To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident." (Plaintiff's Exhibit 1, second page following 268a).

The policy contained one exclusion here relevant, a so-called "products hazard exclusion" (Plaintiff's Exhibit 1A, 282a). The products hazard exclusion stated that the policy did not apply to the "products hazard as defined in the policy."*

The term "products hazard" (insofar as here relevant) was defined in the policy (Plaintiff's Exhibit 1, third page following 268a), as follows:

> "The term 'products hazard' means (1) the handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the Named Insured, other than equipment rented to or located for use of others but not sold, if the accident occurs *after the Insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the Insured* or on premises for which the classification stated in Division (a) of the declarations or in the Company's manual excludes any part of the foregoing; * * * " (Italics ours).

Plaintiff owned worn-out motion picture film which it would ship to Eastman Kodak Company in Rochester, New York. Eastman Kodak would examine the film and discard that part of it which was useless while paying plaintiff for that part which could be used again by Eastman Kodak.

The film contained in part nitro-cellulose which was liable to ignite.

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* Another exclusion, a so-called "explosion exclusion", was also litigated, but this feature of the case is not urged in this Court because it does not have the national significance of the "products hazard exclusion".

While several drums of this film were in the custody of Southern Railway Company at the depot in Charlotte, North Carolina, pursuant to a uniform straight bill of lading, awaiting shipment to Eastman Kodak Company, a fire broke out caused by the film, and property of third parties was damaged.

Defendant refused to cover plaintiff's liability for the damage. It based its disclaimer on the fact that the film, at the time of the fire, had been turned over to the possession of the Southern Railway Company (15a). Indeed, in answer to interrogatories, defendant admitted that at the time of the accident the film was in the custody of Southern Railway Company (42a-43a).

After compromising the third party claims plaintiff brought this action for breach of the contract of insurance.

One of the affirmative defenses pleaded was that there was no coverage because this was a "product hazard" since possession had been relinquished by plaintiff (and products hazard liability is not covered by the policy unless the policyholder purchases specific coverage for products hazards), and defendant had not purchased coverage for products hazards.

The District Court ruled that the term "possession" in the policy was inherently ambiguous and therefore that petitioner's position, that the only fair construction of the term was "actual" possession, was incorrect, and that the term was susceptible of the interpretation "constructive" possession (309a). Since both parties agreed that the film was in the "constructive" possession of respondent it followed that possession had not been relinquished and, therefore, the products

hazard exclusion did not apply so that respondent had coverage.

The majority of the Court of Appeals held that under New York law the District Court's ruling was correct (App. 10).

The dissenting opinion held that under New York law there was no ambiguity because the *popular* meaning of possession (the key in construing words in insurance contracts) was *actual* possession and not constructive possession (App. 16), and admittedly respondent did not have actual possession.

The majority also distinguished a decision of the Ninth Circuit, *General Casualty Company of America* v. *Azteca Films, Inc.*, 278 F(2d) 161 (C.A., 9th, 1960), (a case holding the exact opposite), which they found to be "a case which presents a set of facts virtually identical to those in the present case", on the ground that the law of California, applied in *Azteca,* was different from the law of New York (App. 12).

The dissent held: " * * * California and New York law do not differ in this regard" (App. 15).

REASON FOR GRANTING THE WRIT

Preliminary Comment

We agree with the salutary national basic canon of construction for insurance policies, namely, that specific words are given their ordinary and *popular* meaning, not the technical meaning sometimes employed by lawyers.

When the *popular* meaning is applied to a word in an insurance policy, the result *almost always* favors the insured.

Respondent's difficulty here is that this is one of those rare cases where, when you apply the *popular* meaning of the word "possession", it is clear that what is meant is *actual* possession which does not favor the insured.

Even-handed application of the principle of ascertaining the popular meaning requires that the *popular* meaning of words in insurance policies be applied both in the great majority of cases where the insured thereby profits, and in the rare case, such as at bar, where he does not.

At bar, however, the majority below stretched the popular meaning of possession. The dissent states:

> "The fact that under New York law any ambiguity must be resolved in favor of the insured does not warrant the creation of doubt through a strained or hypertechnical construction of an otherwise plain and unambiguous contract provision" (App. 14).

This disregarding of the *popular* meaning of "possession" by the majority brought the Court below into absolute conflict with the Ninth Circuit in a case (*Azteca*) where the facts and law are identical twins; into conflict with the governing rule of the New York Court of Appeals; and created uncertitude concerning the important products liability coverage in the standard national policy which, in view of the vast in-

crease in products coverage litigation, will certainly cause unnecessary litigation in the uncommitted courts throughout the country.

* * * *

The writ should be granted because of the coalescence of three distinct facts:

(1) there is an absolute, metaphysical conflict between the decision below and the decision of the Ninth Circuit in an identical case, *General Casualty Company of America* v. *Azteca Films, Inc.*, 278 F(2d) 161 (C.A., 9th, 1960), cert. den. 364 U.S. 863 (1960);

(2) while the conflict is as to state law, yet the majority opinion misconstrued or failed to follow the binding rule of the New York Court of Appeals—as indicated strongly in the dissenting opinion—which is wrong under the *Rules of Decision Act,* 28 U.S.C.A. §1652; and

(3) decisions concerning casualty insurance coverage (because of the national nature of the standard policies written) are interchanged among the several jurisdictions to the extent that there is a sort of national common law pertaining to casualty insurance coverage, with the result that the conflict on the precise point involved by two high courts of the stature of the Ninth and Second Circuits has created an unseemly conflict in guidance for other courts.

The Conflict

The conflict between the decision below and the *Azteca* case from the Ninth Circuit is apparent.

Azteca (*an identical twin to the case at bar on the facts, involving explosion of worn out film in possession of a common carrier*) states:

> "* * * the word 'possession' was intended to mean 'actual possession' and was not intended to mean 'constructive possession'" 278 F(2d) 161, 169 (C.A., 9th, 1960).

The decision at bar states:

> "* * * it is apparent that the general rules of interpretation of insurance policies adopted by the New York courts lead to the conclusion that the word 'possession' as used in the exclusion clause of the policy in question should be construed to include 'constructive possession'". (App. 10).

The decision below is based on the supposed fact that the applicable governing rule of the New York Court of Appeals is different than the applicable governing rule of the Supreme Court of California, so that *Azteca* has no value in construing New York law.

In fact, however, the two rules are identical, and rather than argue this at length here it is enough to refer this Court to the short dissenting opinion (App. 13-17), which shows so clearly that the rule in question is the same for both jurisdictions.

Insofar as the conflict is concerned one of these decisions (*Azteca* and the case at bar) must be wrong. These cases are identical twins factually. The governing rules of the two jurisdictions are identical. (See, e.g., *Lachs* v. *Fidelity & Casualty Company of New York*, 306 N. Y. 357, 118 N.E.(2d) 555 (1954) and *Trousdell* v. *Equitable Life Assurance Society*, 55 Cal. App. (2d) 74, 130 P.(2d) 173 (1942)).

In *Azteca* this Court *denied* certiorari (364 U.S. 863 (1960)) after the Court of Appeals for the Ninth Circuit reversed the District Court which had ruled identically with the Court of Appeals at bar.

The *Azteca* ruling is consistent with California law. The ruling below runs counter to New York law. These two cases are so identical on the facts and the law that (because of the national significance of insurance coverage cases) failure to grant certiorari will leave the uncommitted courts throughout the country in a position where one construction ("actual possession") or the other ("constructive possession") will be adopted willy-nilly, an unseemly split of authority offering no reasonable guidance to manufacturers and distributors of products or to insurance companies.

The Majority Below Failed to Follow the Binding Rule of the Court of Appeals of New York

We will not discuss here in depth how the majority below misconstrued or failed to follow the binding rule of the Court of Appeals of New York.

We respectfully refer to this Court the succinct dissenting opinion (App. 13-17) which shows this with precision.

The New York Court of Appeals prohibits construction of instruments unless there is a doubt or ambiguity. "We are not to interpret where there is not reasonable doubt concerning what the parties really agreed upon." *First National Bank of East Islip* v. *National Surety Company,* 228 N.Y. 469, 472 (1920).

"No liberality of construction, however, in favor of the insured permits the inclusion of a risk which has been expressly excluded by the terms of the contract." *Marcus* v. *United States Casualty Company,* 249 N.Y. 21, 25 (1928).

The basic canon of construction of insurance policies laid down by the New York Court of Appeals is what "the average policyholder of ordinary intelligence" (*Abrams* v. *Great American Insurance Company of New York,* 269 N.Y. 90, 92 (1935)); "the average man on the street or the average housewife" (*Lachs* v. *Fidelity & Casualty Company of New York,* 306 N.Y. 357, 364 (1954)) would have understood the words to mean. Put another way it is "the reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract" (*Tonkin* v. *California Insurance Company of San Francisco, Inc.,* 294 N.Y. 326, 329 (1945)).

This is identical with the basic California canon of construction:

> "The test to be applied by the court in determining whether there is ambiguity is not what the insurer intended its words to mean, *but what a reasonably prudent person applying for insurance would have understood them to mean*" *General Casualty Company of America* v. *Azteca Films, Inc.*, 278 F(2d) 161 (C.A., 9th 1960) (Italics ours).

Both the New York Court of Appeals and the Supreme Court of California make the basic canon of construction what words mean to an intelligent layman. In *Whiteside* v. *Insurance Co. of Pennsylvania;* 274 App. Div. 36, 38, 79 N.Y.S. (2d) 715, 717 (1st Dept., 1948), it was stated:

> "The courts have repeatedly held that the interpretation of a clause in a policy of insurance is to be determined by what it means to the ordinary businessman, *not what it might convey on careful analysis to a trained lawyer*" (Italics ours).

The term "possession" (of goods or products) can mean only *one thing* to the "average policyholder", "the average man on the street", "the average housewife", "the ordinary businessman", and the "reasonably prudent person applying for insurance", namely, *actual* possession.

This is what the Court of Appeals for the Ninth Circuit said in *Azteca*:

> "The test to be applied by the court in determining whether there is ambiguity is not what the insurer intended its words to mean, but what

a reasonably prudent person applying for insurance would have understod them to mean.

* * * In other words, *the criterion is ambiguity from the standpoint of a layman, not from that of a lawyer.* * * *

"* * * *it would seem that the word 'possession' as here used would convey to the ordinary mind, the layman, the idea of actual possession. The concept of constructive possession is the sort of concept that would more likely occur to a lawyer* * * *" (Italics ours). (Pages 167-168 of case report).

The dissent at bar (App. 16) stated the same thing:

"To a layman, whether businessman or housewife, possession means actual or physical control. There is no ambiguity here."

It is clear that the majority below, in ruling that the word "possession" in the policy was susceptible of the interpretation "constructive" possession, did not follow the binding rule of the New York Court of Appeals as it was required to do.

The National Nature of Decisions on Casualty Insurance Coverage

The practical effect of this decision is that all policies containing a so-called "products hazard exclusion" (and they are legion) are now open to two metaphysically contradictory rules of interpretation.

Since California and New York law are identical on the point (indeed, it appears that practically all our jurisdictions are the same; see *1* Couch, *Insurance,* § 15:83 (2nd ed., Anderson, 1959)) any court can now choose either rule it wants according to its personal philosophy, in the absence of a specific decision on the point from the higher courts of the jurisdiction. It appears that the only true decisions right in point are *Azteca* and the case at bar.

The practical effect on other litigants is clear. There are innumerable comprehensive general liability policies held by all types of business people who manufacture, supply and sell all types of products, which policies do *not* contain products coverage. When these products are in transit, having been delivered to common carriers, *actual* possession has been relinquished. If a casualty occurs at such time and personal injury or property damage is caused because of the existence of any condition in these products, coverage for the insured's liability will exist if a court chooses to follow *the decision at bar,* because "possession" in the policy (according to the Second Circuit) means both actual *and constructive* possession, but coverage will not exist if a court chooses to follow *Azteca,* because possession in the policy (according to the Ninth Circuit) means only *actual* possession.

This case does not concern merely its own peculiar facts. It adjudicates for all people similarly situated that their policies give them coverage even though their products have left their actual possession, while *Azteca* adjudicates for all people similarly situated just the opposite.

Insurance companies throughout the country, having issued this standard policy, with the standard "products hazard exclusion" unless specific coverage for the products hazard is purchased, cannot now know whether there is or is not coverage when the product passes out of the *actual* possession of the insured, which the dissenting opinion (App. 17) states was the point at which the insurer (in this standard national policy) sought to limit the coverage.

It cannot be too strongly emphasized that the law of California and of New York, in the interpretation of insurance policies, is identical, so that this is not a situation of contradictory results (*Azteca* and the case at bar) based on different local rules of law.

Unquestionably the conflict will invite unnecessary litigation (there is enough products coverage litigation already) in those jurisdictions which have not ruled on the point, which appears to be every jurisdiction except the federal courts in California and New York, for *Azteca* and the case at bar are the only cases which are truly precisely in point. (Actually, it appears that *Azteca* does state California law correctly while the decision below is contrary to New York law, as the dissenting opinion so clearly shows. But this factor will not prevent courts of other jurisdictions from following what *purports* to be a valid state rule, i.e., the one found in the decision below, with the result that insurance companies and policy holders will never know whether coverage does or does not exist until each court decides to follow the one rule or the other).

Unquestionably this decision will have continuing consequences nationally in view of the general increase in products coverage litigation.

While this Court denied certiorari in *Azteca* (364 U.S. 863 (1960)) it does not, of course, necessarily follow that *Azteca* was correctly decided. Now, however, because of the decision below (where there are no real differences between the facts and law in these identical twin cases) it does follow that either *Azteca* or the case at bar is wrong. These metaphysical opposites cannot coexist.

Therefore, because of the contradictory interpretations (by two influentially persuasive and respected Courts of Appeal) of this feature of the standard national general liability policy, affecting numerous policy holders who have not purchased products liability coverage but whose products will be taken to the market by common carriers *after* the insureds have surrendered *actual* possession, and because of the grab-bag, pot luck effect of this conflict on uncommitted courts throughout the country, this Court should resolve this unseemly conflict and decide whether *Azteca* or the case at bar is correct.

Conclusion

For the above reasons a writ of certiorari should be granted.

Respectfully submitted,

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Opinion, Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 425—September Term, 1965.

(Argued June 13, 1966 Decided August 3, 1966.)

Docket No. 29674

NATIONAL SCREEN SERVICE CORPORATION,
Plaintiff-Appellee,

—v.—

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Defendant-Appellant.

Before:

HAYS, ANDERSON and FEINBERG,
Circuit Judges.

Appeal from judgment in favor of plaintiff insured, against defendant insurance company on a business liability policy, in the United States District Court for the Southern District of New York, John M. Cannella, *Judge* with a jury.

Affirmed.

WALTER S. BECK, Esquire, New York, N. Y. (Phillips, Nizer, Benjamin, Krim & Ballon, and Theodore H. Friedman, Esq., New York, N. Y., on the brief), *for Plaintiff-Appellee.*

JAMES M. GILLERAN, Esquire, New York, N. Y. (John J. O'Connor, Esq., New York, N. Y., on the brief), *for Defendant-Appellant.*

Opinion, Court of Appeals

ANDERSON, *Circuit Judge*:

National Screen Service Corporation, the insured, commenced the present action on an insurance policy in the Supreme Court of New York seeking recovery against United States Fidelity and Guaranty Company, the insurer, for refusing to defend and pay various claims asserted by third parties against National. The suit was removed to the District Court for the Southern District of New York, on the basis of diversity, pursuant to 28 U. S. C. §1441 (1964 ed.). The District Court rendered judgment for National and USF&G appeals.

The facts are these: National, the appellee, is engaged in the business of producing and distributing motion picture "trailers," more commonly known as coming attractions and other motion picture display material. None of the material was ever sold to exhibitors, but rather was licensed for theatre use. When the trailers were no longer of any use they were returned to National, which in accordance with a continuing agreement with the Eastman Kodak Company, sent all worn out film which it could no longer use to that company at Rochester, New York. The film was shipped, by transportation selected and paid for by National, to Kodak's Rochester facility where the film was examined to determine whether there was sufficient silver compound remaining on the face of the film to make salvage feasible. In practice Kodak accepted and paid for all scrap film which was tendered to it, though the amount of payment varied according to suitability of the film for salvage.

Kodak had the right, however, to reject any shipment.

The present suit involves an incident which occurred on June 24, 1954. National had in force on that date a "Comprehensive General Liability Policy" issued to it by the appellant, USF&G, on December 31, 1953 for a one year period. The policy protected National against all potential liability for negligence in connection with the conduct of its business, which was declared on the face of the policy to be "motion picture previews-displays," except to the extent that the policy explicitly excluded coverage for certain risks. The policy obligated USF&G to defend National in any suits brought against it "alleging such injury, sickness, disease or destruction and seeking damages on account thereof . . ."; it also contained a number of exclusion clauses, two of which are particularly relevant to this case. First, the so-called "products hazard exclusion" provided that the policy did not cover "products hazard as defined in the policy." The definition was as follows:

> "The term 'products hazard' means (1) the handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the Named Insured, other than equipment rented to or located for use of others but not sold, if the accident occurs after the Insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the Insured or on premises for which the classification stated in Division (a) of the declarations or in the Com-

pany's manual excludes any part of the foregoing;"

It was apparently the purpose of that exclusion to place a certain limit on the coverage for products liability of the kind imposed by *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382 (1916) (Cardozo, *J.*). See also *La Rocca* v. *Farrington*, 301 N. Y. 247, 250, 93 N. E. 2d 829, 830 (1950). Second, there was a clause which excluded liability for "injury to or destruction of property arising out of . . . blasting or explosion . . . while such operations are being performed by the Named Insured."

A few days before June 24th, National had filled with scrap film and sealed several steel drums, and readied them for shipment to Kodak. On June 24th the Wayland Transfer Co. called for the drums at National's Charlotte, N. C. premises and furnished National with a non-negotiable uniform straight bill of lading. Wayland had been retained by the Southern Railway Co. to make the pick up and to transport the drums to the railroad's local freight depot, whence they were to be shipped to Kodak by rail. After the drums arrived at the depot they remained on the outdoor platform for several hours until they were moved inside. Later in the day a fire, allegedly caused in part by the combustion or explosion of National's film, occurred at the depot, causing damage to the property of a number of innocent third parties, who in due course asserted claims against National for negligence and sought to recover for their losses. National, in turn, gave timely and sufficient notice of the claims against it to USF&G and re-

quested that the insurance company undertake to defend the claims. After an investigation, however, USF&G disclaimed any liability, for two reasons: first, on the ground that liability was excluded under the "products hazard exclusion," and second, that the damage was caused by explosion, a risk which was explicitly excluded from coverage. As a result of the insurance company's refusal, National had to retain its own local counsel in North Carolina. Ultimately the claims were settled for a total of $25,201.50 and legal fees, conceded by USF&G to have been reasonable, were incurred in the amount of $7,500.

In the district court, the trial centered around the issues of whether or not either of the two exclusion clauses precluded coverage for the losses sustained by National. The court submitted for determination by jury the questions of "whether the exclusion clause in the insurance contract covering explosions was applicable to the events in question," and whether or not the loss was occasioned by explosion. A general verdict for the plaintiff was returned. The district judge reserved for his own determination "the question of the applicability of the products liability exclusion clause . . . , the issue of damages and the defendant's post-trial motion to set aside the verdict . . . or in the alternative for a new trial." In a careful opinion the district judge held that the insurer was liable to National. We affirm.

PRODUCTS HAZARD EXCLUSION—

USF&G urges that it was absolved from liability for the loss incurred by National by the terms of the

products hazard exclusion, because the loss occurred, in the words of the policy, "after the Insured has *relinquished possession* thereof to others and away from premises owned, rented or controlled by the Insured . . . ." (Emphasis added.) The central issue thus is whether National had possession of the film at the time of the loss, and that question in turn depends upon whether the word "possession" as used in the policy clause should be read to include the concept of "constructive possession" as well as actual possession.

The trial judge held that (1) National's business, was such that it was "not in a position to require it to purchase products liability coverage and that as such the products hazard exclusion would have no application to the facts present . . ." He also found that, in any case, the word "possession," as used in the exclusion clause, included constructive as well as actual possession, and that therefore, since National still retained constructive possession of the drums at the time of the loss, USF&G remained liable on the policy.

We think that it is not necessary to reach the question of whether National's business was such that it should have carried products liability insurance, as it is our opinion that the products hazard exclusion did not affect the coverage in this case.

Since the policy in question was issued by USF&G from its principal office in New York, the law of that state governs this case, as the parties concede. *Fleet Messenger Service* v. *Life Insurance Company of North America,* 315 F. 2d 593 (2d Cir. 1963). We are of the opinion that on the facts here presented the New York courts would construe the word possession

broadly to include constructive as well as actual possession. The relevant case law in New York evinces a very strong tendency to favor the insured when construing words of ambiguous meaning in insurance contracts. There is a general tendency in a majority of jurisdictions to apply the principle of *contra proferentem* and thus to choose the construction most favorable to the insured (see 1 Couch, Insurance §15:73 (2d ed., Anderson ed. 1959); 3 Corbin, Contracts §559 (1960)). New York clearly and unequivocally adheres to this rule.

The appellant argues that "possession" must be defined to include only actual possession, because "a contract of insurance, drawn by the insurer, must be read through the eyes of the average man in the street or the average housewife who purchases it." That particular formulation of the plain meaning rule is taken from *Lachs* v. *Fidelity & Casualty Co. of New York*, 306 N. Y. 357, 364 (1954). Somewhat different statements can be found in other New York cases. E.g., *Abrams* v. *Great American Ins. Co.*, 269 N. Y. 90, 92, 199 N. E. 15, 16 (1935); *Hartol Products Corp.* v. *Prudential Ins. Co.*, 290 N. Y. 44, 49, 47 N. E. 2d 687, 690 (1943).

The appellant relies strongly upon the *Abrams* case which concerned a policy issued to cover a jeweler's loss "arising from any cause whatsoever except . . . (a) loss or damage or expenses by or resulting from theft, conversion or other act or omission of a dishonest character . . . on the part of . . . any person to whom the property hereby insured may be entrusted by whomsoever for any purpose whatsoever . . ." The

decision turned upon whether the word "theft" in its ordinary sense included larceny by trick, and whether the word "entrusted" in its ordinary sense included delivery of the jewels into the hands of a thief where the owner made the delivery, confident that the jewels would be used for the purpose which the owner intended and without any knowledge on his part that the recipient was a thief. The court gave affirmative answers to both questions. There was no issue and no discussion in the case of constructive possession. The general rule of interpretation laid down was "the language employed in the contract of insurance must be given its ordinary meaning, such as the average policy holder of ordinary intelligence, as well as the insurer, would attach to it." 269 N. Y. 92, at 93. The word "theft" is frequently interpreted not only in ordinary speech but in legal contexts as including larceny by trick, embezzlement and kindred offenses. It is by no means limited to the technical common law definition of larceny. *American Insurance Co.* v. *Burson,* 213 F. 2d 487, 490 (5th Cir. 1954); *Pennsylvania Indemnity Fire Corp.* v. *Aldridge,* 117 F. 2d 774, 778 (D. C. Cir. 1941); N.Y. Penal Law §1290. The word "entrusted" in the general context in which it was used in the *Abrams* case has no technical legal meaning apart from its use in ordinary speech, as the opinion appears to have recognized.

Abrams, decided in 1935, in applying the general rule of construction, said nothing of an authoritative nature with regard to the meaning which the average policy holder of a general business liability policy would give to the word "possession" in the circumstances of the present case.

The criterion for the application of the plain meaning rule contained in *Lachs* v. *Fidelity and Casualty Co. of New York, supra,* that the terms of an insurance contract must be read "through the eyes of the average man in the street or the average housewife who purchases it," is particularly suited to, an airplane flight insurance policy purchased by a passenger at an airport through a coin machine and should be confined to that kind of policy. It is not, however, particularly useful in construing the policy at issue in the present case, because few men on the street and few housewives would be purchasers of the specialized business policy with which we are concerned. A better measure is that enunciated in *Tonkin* v. *California Insurance Company of San Francisco Inc.,* 294 N. Y. 326, 329, 62 N. E. 2d 215, 216 (1945) in which the Court of Appeals said, "We know of no better guide in a situation of this sort than 'the reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract.'" See *Lumbermens Mut. Cas. Co.* v. *Town of Pound Ridge,* —— F. 2d —— (2d Cir. June 14, 1966).

For the purpose of this kind of policy the average person is not the housewife purchasing flight insurance but the average purchaser of broad business liability insurance such as the appellee here. It is more than likely that such an insured would be aware that it would still have constructive possession of goods which it has turned over to a delivery man and a common carrier for transportation on the insured's behalf to another. Particularly where, as here, it still held title to the products and was exposed to liability. National knew that it was the owner of the drums of used films

and remained so until title passed on delivery of the goods into the hands of Kodak. It must have been clear both to the insurer and the insured that National, the insured, remained liable under the *MacPherson* v. *Buick Motor Co.* rule to third persons who suffered injury or damage even after title passed to Kodak. In view of this the insurer sought to limit the coverage of its policy at the point where the insured lost its power to control the product, as an incident of its ownership, and that power to control passed to Kodak when it became owner of the product. It is hardly likely that it was the reasonable expectation of the insured, or its purpose, to purchase liability insurance to cover its product only while it was inside the gates of its own plant and that it would become its own insurer while the product was in the hands of a delivery man and a common carrier transporting it on National's behalf, and when the chance of injury to third persons was even greater. Nor is it logical to suppose that the insurer thought or understood that its policy was so limited. Therefore, it is apparent that the general rules of interpretation of insurance policies adopted by the New York courts lead to the conclusion that the word "possession" as used in the exclusion clause of the policy in question should be construed to include "constructive possession."

Even putting this determination aside, however, there was certainly a question whether or not under the circumstances of this case, the word "possession" meant not only actual but also "constructive possession." This in itself created an ambiguity in the "products hazard" exclusion clause. The appellant insurance company does not dispute that the appellee

had constructive possession, as the trial court found, but asserts that the word "possession" in the exclusion clause does not include "constructive possession." New York law, however, calls for a liberal interpretation of the terms of insurance policies in favor of the insured.

In *Sincoff* v. *Liberty Mutual Ins. Co.*, 11 N. Y. 2d 386, 230 N. Y. S. 2d 13 (1962) the New York Court of Appeals held that where there is an ambiguous word in an insurance policy the burden which the defendant insurer must carry is to show that the construction it urges is such "that it would be unreasonable for the average man reading the policy to conclude" that a meaning other than that urged by the insurance company was possible and "that its own construction was the only one that fairly could be placed on the policy." 230 N. Y. S. 2d at 16. Thus, it would seem that in New York the insurance company can avail itself of the plain meaning rule only in those cases where "such a definition was the *only* one that could 'fairly be placed thereon.' " (Emphasis in original.) 230 N. Y. S. 2d at 15. See also *Hartol Products Corp.* v. *Prudential Ins. Co., supra,* 290 N. Y. at 49-50. The appellant has not met that test in this case. When that condition is not satisfied the rule is, that where an ambiguous word is used, "such ambiguity should . . . [be] resolved in favor of the insured." *Sincoff* v. *Liberty Mutual Ins. Co., supra,* 230 N. Y. S. 2d at 16; *Fidelity & Casualty Co. of N. Y.* v. *Groth,* 296 N. Y. 788, 71 N. E. 2d 470 (1947); *Janneck* v. *Metropolitan Life Ins. Co.,* 162 N. Y. 574 (1900). And as the New York Court noted in *Sincoff, supra,* "this rule [of favoring the insured] has par-

ticular application where exclusions are involved." 230 N. Y. S. 2d at 16. See also *Shneiderman* v. *Metropolitan Casualty Company of N. Y.*, 14 App. Div. 2d 284, 289, 220 N. Y. S. 2d 947, 951 (1961); *Sperling* v. *Great American Ins. Co.*, 7 N.Y. 2d 442, 447, 199 N. Y. S. 2d 465, 469 (1961); *Birnbaum* v. *Jamestown Mut. Ins. Co.*, 298 N. Y. 305, 313, 83 N. E. 2d 128 (1948). The rule would seem to have special vigor when applied to a policy such as the one involved here which is by its own terms denominated a "comprehensive general liability policy." Cf. *Sincoff, supra*, 230 N. Y. S. 2d at 16, where it was said that "a vague exclusion . . . should not be permitted to prevent indemnity" where the policy was of the kind denominated "all risks" by the insurance company.

Appellant relies heavily upon the decision of the Ninth Circuit in *General Casualty Co.* v. *Azteca Films, Inc.*, 278 F. 2d 161 (1960), a case which presents a set of facts virtually identical to those in the present case, and in which a contrary result was reached under California law. We feel, however, that the governing law of New York is so strong that we are constrained to reach a different result from *Azteca*.

Furthermore, we find no reason to question the factual determination made by the district court that National did in fact have constructive possession of the drums while they were *in transitu*. And therefore we agree with the result reached by the trial court, that the products hazard exclusion did not relieve USF&G from liability under the policy.

EXPLOSION EXCLUSION

The trial judge charged the jury in substance that they must first "determine whether or not it was the understanding and agreement of these parties that this rider [i.e., the explosion exclusion] applied to them." The jury was further instructed that it was next to decide "whether or not the damage was caused by an explosion." The jury returned a general verdict for the plaintiff. On this appeal the insurance company urges as error the part of the charge in which the jury was asked to determine whether the parties had intended to include the explosion exclusion in the policy. While we agree with the appellant that that issue was not properly in the case, and the jury should not have been charged as it was, we nevertheless affirm because of the failure of the defense counsel to make any objection to the charge at the trial. F. R. Civ. P. 51. See *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965), cert. denied 383 U. S. 907 (1966). The trial judge specifically admonished counsel "to keep their eye open for any objections they care to make." Furthermore, there was ample evidence from which the jury could have concluded that there had been no explosion.

We have considered the other points raised by the appellant, and find them to be without merit.

The judgment of the district court is affirmed.

HAYS, *Circuit Judge* (dissenting):

I would reverse.

The issue is whether the plaintiff "relinquished possession" within the meaning of the products hazard

exclusion.[1] If so, the insurance company is not liable.

The fact that under New York law any ambiguity must be resolved in favor of the insured does not warrant the creation of doubt through a strained or hypertechnical construction of an otherwise plain and unambiguous contract provision. See *Doyle* v. *Allstate Ins. Co.*, 1 N. Y. 2d 439, 443, 136 N. E. 2d 484, 487, 154 N. Y. S. 2d 10, 13 (1956); *Abrams* v. *Great American Ins. Co.*, 269 N. Y. 90, 92, 199 N. E. 15, 16 (1935); 1 Couch, *Insurance* §15:85 (2d ed. Anderson 1959).

In *General Casualty Co.* v. *Azteca Films, Inc.*, 278 F. 2d 161, 165 (9th Cir.), cert. denied, 364 U.S. 863 (1960), a case that my brethren concede is "virtually identical" with the case before us, the Ninth Circuit Court of Appeals framed the issue as we must: "whether the clause under examination—because of the word 'possession'—is ambiguous." The court properly concluded:

> "'it would seem that the word 'possesion' as here used would convey to the ordinary mind, the layman, the idea of actual possession. The concept of constructive possession is the sort of concept that would more likely occur to a lawyer. . . . If this [i.e., what the insured did] does not amount to relinquishment of possession, as

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[1] The policy reads:

"The term 'products hazard' means (1) the handling or use of the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the Name Insured, other than equipment rented to or located for use of others but not sold, if the accident occurs after the Insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the Insured . . ."

> the term would be understood by a layman, it is difficult to conceive what additional facts and circumstances would be required." *Id.* at 168.

In the present case the majority seeks to distinguish the *Azteca Films* case on the ground that the "result was reached under California law." But the crucial question is whether there is ambiguity, and California and New York law do not differ in this regard.

The rule in New York is that language in a contract of insurance must be given its "ordinary meaning, such as the average policy holder of ordinary intelligence" would attach to it. *Abrams* v. *Great American, supra* at 92, 199 N. E. at 16; see *Lachs* v. *Fidelity & Casualty Co.*, 306 N. Y. 357, 364, 118 N. E. 2d 555, 558 (1954). Compare, e.g., *Trousdell* v. *Equitable Life Assur. Soc.*, 55 Cal. App. 2d 74, 130 P. 2d 173 (1942). A court must determine whether there is "ambiguity from the standpoint of a layman, not from that of a lawyer." 1 Couch *op. cit. supra* §15:83 at 824. In *Abrams* v. *Great American, supra,* the claim of a policyholder, a commercial jeweler, that common words in an exclusion clause should be given a technical legal definition, was rejected because "common words in the policy as 'theft,' 'dishonest,' and 'entrusted' cannot be deemed to have been used as words of art with legalistic implications." *Id.* at 92, 199 N. E. at 16.

Although Abrams was a commercial jeweler who had purchased a comprehensive policy insuring his business, the majority, still purporting to interpret New York law, limits the rule of *Abrams* and similar cases to "an airplane flight insurance policy purchased by a

passenger at an airport through a coin machine." Then, relying on *Tonkin* v. *California Ins. Co.*, 294 N. Y. 326, 329, 62 N. E. 2d 215, 216 (1945), where the court looked at a policy through the eyes of an "ordinary businessman," my brothers argue that such a businessman would be aware of the technical legal concept of "constructive possession." But the New York Court of Appeals in *Tonkin* did not endow their "ordinary businessman" with the powers of a skilled attorney. In "applying this general principle" the court said:

> "it is reasonable to suppose . . . that the fair meaning and use of the word 'comprehensive' included those damages which an *ordinary individual* would reasonably and naturally regard as incidental to or flowing from the hazard insured against." (Emphasis added.) *Id.* at 329, 62 N. E. 2d at 217.

In a later case, the Appellate Division made clear that:

> "The courts have repeatedly held that the interpretation of a clause in a policy of insurance is to be determined by what it means to the ordinary businessman, not what it might convey on careful analysis to a trained lawyer." *Whiteside* v. *Ins. Co. of Pennsylvania*, 274 App. Div. 36, 79 N. Y. S. 2d 715, 717 (1st Dep't 1948).

To a layman, whether businessman or housewife, possession means actual or physical control. There is no ambiguity here.

The majority concedes that "the insurer sought to limit the coverage of its policy at the point where the insured lost its power to control the product." There can be no doubt that this point was reached.

Judgment, Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of August one thousand nine hundred and sixty-six.

Present:

HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges

NATIONAL SCREEN SERVICE CORPORATION,
Plaintiff-Appellee,

– v. –

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Judgment, Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

/s/ By VINCENT A. CARLIN
Chief Deputy Clerk